Supreme Court, U.S.
FILED

011876 NOV - 7 2001

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

ROSALIO FRANCO,

Petitioner,

v.

J M PAINTING & DRYWALL;
THE STATE INDUSTRIAL INSURANCE SYSTEM
(Now known as the
EMPLOYERS INSURANCE COMPANY OF NEVADA)

Respondents.

On Petition For Writ Of Certiorari
To The Nevada Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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71 pages

QUESTIONS PRESENTED FOR REVIEW

1. Can a state industrial insurance system invidiously discriminate against a class of injured workers, entitled to the workers' compensation benefits under the state law, solely on the basis of their alienage, in violation of the Equal Protection and Due Process clauses of the Fourteenth Amendment to the U.S. Constitution, by denying them a portion of the workers' compensation benefits?

2. Does federal immigration law preempt the Nevada state law in the area of industrial insurance, prohibiting the award of vocational rehabilitation benefits to undocumented aliens who are otherwise entitled to such benefits?

PARTIES TO THIS PROCEEDING

The names of all parties to this proceeding are contained in the caption of this case. Petitioner is an individual, not a corporate entity. *See* Supreme Court Rules 14.1(b) and 29.6.

While this case was pending, the State Industrial Insurance System ceased to exist following privatization of the Nevada industrial insurance system. Its successor in interest with respect to this matter is Employers Insurance Company of Nevada (hereinafter "EICON"), a private insurance carrier. For purposes of clarity, both State Industrial Insurance System and EICON will be referred to as "EICON" throughout this Petition.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Rosalio Franco (hereinafter "Franco"), hereby petitions this Court to issue a Writ of Certiorari to review the judgment of the Nevada Supreme Court. The issues herein pertain to the applicability of the Equal Protection and Due Process clauses of the 14th Amendment to the U.S. Constitution, as well as the preemption of the state law in the area of insurance by the Immigration Reform and Control Act, 8 U.S.C. § 1324a (1998) (hereinafter, "IRCA"). Petitioner expressly raised below the questions of federal law presented in this petition. Nevada Supreme Court's failure to properly apply the federal law necessitates review by this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS

See Appendix hereto.

OPINIONS BELOW

The opinions of the Nevada Supreme Court, the Eighth Judicial District Court for Clark County, State of Nevada and the Appeals Officer of the Nevada Department of Administration are not reported. The Nevada Supreme Court relied on its earlier ruling in *Tarango v. SIIS*, 25 P.2d 175, 117 Nev. Adv. Op. No. 40 (2001).

STATEMENT OF JURISDICTION

This Petition seeks review of the Order Denying Rehearing filed on August 10, 2001. The jurisdiction of this Court rests upon 28 U.S.C. § 1257.

STATEMENT OF THE CASE

Petitioner, Rosalio Franco, (hereinafter "Franco") sustained an industrial injury to his back on September 7, 1995, while in the course and scope of his employment with J.M. Painting & Drywall. The industrial insurance claim was properly accepted for all appropriate benefits by the EICON under the applicable state industrial insurance law. As a result of the industrial injury, Franco suffered permanent disability and received a seventeen percent (17%) Whole Person Impairment award from EICON. Franco also became subject to permanent medical work restrictions of "thirty pounds maximum lifting" and "fifteen pounds repetitive lifting." Such restrictions permanently precluded him from returning to his pre-injury employment. Therefore, he became eligible for vocational rehabilitation services under the applicable state law pursuant to Nevada Revised Statutes (hereinafter, "NRS") 616C.590(1).

On August 12, 1997, EICON offered Franco a $12,000 lump sum settlement of his vocational rehabilitation benefits pursuant to NRS 616C.595. Franco accepted the offer. Prior to payment of the settlement, EICON requested proof of legal work status, even though EICON was not assisting Franco in any way in finding employment in the US. Upon learning that Franco was an undocumented alien, EICON denied the payment of the above-referenced settlement amount. Franco's eligibility for vocational rehabilitation and the proper form for such vocational rehabilitation is undisputed, except for his status as an undocumented alien.

Franco appealed the denial of vocational rehabilitation benefits through the applicable administrative process. Franco then timely filed a Petition for Judicial Review with the Nevada District Court on March 10, 1998. On July 6, 1999, the

Nevada District Court denied the Petition for Judicial Review. On July 16, 1999, Petitioner timely appealed to the Nevada Supreme Court. On June 27, 2001 the Nevada Supreme Court found against the Petitioner in reliance on its recent decision in Tarango v. SIIS, 25 P.2d 175, 117 Nev. Adv. Op. No. 40 (2001). The Petitioner timely requested rehearing on July 20, 2001. On August 10, 2001, the Nevada Supreme Court denied the request for rehearing.

REASONS FOR GRANTING THE PETITION

This is an issue of first impression, never before specifically addressed by this Court. This Court has ruled that the undocumented aliens present in the United States are entitled to the protection of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the U.S. Constitution, as well as certain other constitutional protections. However, this is the first opportunity for this Court to specifically address the issue of whether it is proper for a state high court to arbitrarily deny some of its residents their rights, *solely due to their alienage status*, especially considering that the state legislature had specifically granted undocumented aliens such rights. The outcome of this litigation will have a far-reaching effect. It will affect the life and livelihood of the Petitioner herein as well as countless others in numerous States.

Undocumented workers hold a precarious position in the US legal system: their very presence at the workplace is at the same time unlawful and necessary to perform the most difficult work at the lowest wages. A very large number of undocumented aliens reside in the United States. The results of the 2000 census have prompted experts to estimate the

undocumented population at 7.1 to 9 million people.[1] As one INS employee explains, "If you go to any hotel, any restaurant, any mall, you're going to see illegal workers." [2]

Recognizing the national importance of the rights of undocumented aliens, this Court has held that they are protected by the Equal Protection Clause of the Fourteenth Amendment against invidious discrimination in application of laws. *Plyler v. Doe*, 457 U.S. 202, 210, 72 L. Ed. 2d 786, 102 S. Ct. 2382 (1982). These protections extend to the workplace to avoid creation of an "underclass" of workers which would fall easy prey for unscrupulous employers. They also preserve the integrity of the democratic tradition underpinning the U.S. legal system. Furthermore, the practical realities are such that the impact of laws on the undocumented aliens affects the entire society, including the members of immediate families of such aliens, many of whom are (or will eventually become) American Citizens.

The recent Nevada Supreme Court decision in *Tarango, supra*, upon which the Nevada court relied in its decision of the present case, jeopardizes these principles by allowing invidious discrimination against undocumented aliens to flourish in the State of Nevada under the sanction of law. Review of the decision of Nevada Supreme Court by this Court is essential to stop to the practices that have no place in our legal system.

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[1] *See* Susan Sachs, *A Hue, and a Cry, in the Heartland,* N.Y. TIMES, Apr. 8, 2001, § 4, at 5.

[2] Jerd Smith, *Working in the Shadows Illegal Aliens a Fact of Life in Colorado's Economy,* ROCKY MTN. NEWS, Apr. 18, 1999, at 1.

I. Review Is Warranted Because the Nevada Supreme Court Refused To Stop EICON From Perpetrating Invidious Discrimination Against A Class Of Injured Workers Solely Because Of Their Alienage.

Franco was injured in the course and scope of his employment. He received medical benefits and compensation for disability under the Nevada Industrial Insurance Act, NRS 616A-D, which expressly provides that undocumented aliens are eligible for workers' compensation benefits in Nevada.[3] Because Franco was medically incapable of returning to his pre-accident employment, he became eligible for vocational rehabilitation. In Nevada, vocational rehabilitation can take several forms, including re-employment, re-education or payment of money. *See* NRS 616C.530, *infra.*

Prior to learning the immigration status of Franco, EICON had determined that the most appropriate form of his vocational rehabilitation was to re-educate him to become an electronics technician. Franco then made a request for a lump sum payment in lieu of vocational rehabilitation, pursuant to NRS 616C.595. EICON approved the request and actually offered Franco the cash payment of $12,000. EICON then requested that Franco verify his employment eligibility, and refused payment upon Franco's inability to do so. Had Franco been a U.S. citizen or a documented alien, he would have received the payment of the $12,000. **The benefits at issue herein are being denied solely due to his alienage,**

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3 NRS 616A.105 in pertinent part provides: "Employee" and "workman" are used interchangeably in chapters 616A to 616D, inclusive, of NRS and mean every person in the service of an employer . . . **whether lawfully or unlawfully employed**, and include, but not exclusively: (1). **Aliens** and minors..." (Emphasis added.)

thus EICON's actions constitute invidious discrimination.

EICON has argued throughout this case that vocational rehabilitation necessarily requires direct placement of an injured worker for employment in the United States. As placement of known undocumented aliens for employment in the US is prohibited under IRCA, 8 USCS § 1324(a), *infra*, EICON claimed that it is precluded by such federal immigration law from providing vocational rehabilitation to undocumented aliens.[4] However, as is well known to EICON, pursuant to NRS 616C.530 and 616C.595 vocational rehabilitation benefits under the Nevada law are not limited to the direct job placement. **In this case, EICON actually offered Franco a lump sum settlement of $12,000.00 in lieu of vocational rehabilitation.** Employment in the United States has not even been discussed as a possibility in this case. Thus, providing vocational rehabilitation services to Franco would not cause EICON to engage in a violation of IRCA by finding him a job in the United States.

EICON's purported "fears" of criminal prosecution, fines and imprisonment for providing vocational rehabilitation services to Franco are not realistic. They are nothing more than a pretext for EICON's discriminatory conduct. Nothing in the evidentiary record indicates that a job in the United States consistent with Franco's medical restrictions would be made available to Franco if he had authorization to legally work in the United States. On the contrary, if vocational rehabilitation were provided in this case, it would be in a form of a lump-sum payment, which would not in any way violate IRCA.

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[4] The issue of the alleged federal preemption, raised by EICON, will be discussed in greater detail below

It is particularly important to note that the request for verification of employment eligibility in this case was not made by EICON until ***after*** it was determined that the most appropriate form of Franco's vocational rehabilitation was a payment of money. Neither IRCA nor any other applicable federal law requires that an insurance company verify employment eligibility of the beneficiary prior to payment of cash funds. Neither IRCA, nor any applicable federal law, prohibits payment of cash funds to undocumented aliens. EICON was acting invidiously on its own volition in requesting employment authorization documents from Franco prior to providing the payment. Therefore, EICON committed an act of blatant, invidious discrimination against Franco based ***solely*** on his alienage. Such conduct is unconstitutional and should not be tolerated.

A. The Nevada Supreme Court Misinterpreted The Plyler Decision In Concluding That EICON's Actions Were Reasonably Related To A Legitimate Governmental Purpose.

By upholding EICON's position in this case, the Nevada Supreme Court created two classes of injured workers with respect to the Nevada Industrial Insurance Act: the undocumented aliens, not eligible for vocational rehabilitation in any form, and documented workers, eligible for such benefits upon proper medical findings. The Nevada Court denied the undocumented aliens the rights granted to them by the Nevada legislature solely because of their undocumented status. Such finding is contrary to the well-established body of this Court's case law, and should be reversed.

There is no doubt that aliens, including the undocumented aliens, are entitled to equal protection of the law and protection from discrimination. *See e.g. Sugarman v. Dougall*, 413 U.S. 634, 641 (1973); *Almon v. Reno*, 192 F.3d 28, 31 (1st Cir. 1999), *cert. denied*, 121 S. Ct. 83 (2000). This Court addressed this issue at length in *Plyler, supra*, and held as follows:

> Aliens, even aliens whose presence in this country is unlawful, have long been recognized as "persons" guaranteed due process of law by the Fifth and Fourteenth Amendments. Indeed, we have clearly held that the Fifth Amendment protects aliens whose presence in this country is unlawful from invidious discrimination by the Federal Government.
> *Id.* at 211.
>
> . . .
>
> **The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation.** That objective is fundamentally at odds with the power the State asserts here to classify persons subject to its laws as nonetheless excepted from its protection.
> *Id.* at 214. (Emphasis added).

The Nevada Supreme Court in *Tarango*, 25 P.2d. at 182-183, erroneously interpreted the *Plyler* majority opinion to mean that a rational-basis equal protection test applies when the rights of undocumented aliens are reviewed. The language cited to by the Nevada Court, specifically footnote 19 of the *Plyler* majority opinion, is mere *dicta*, and does not specifically establish that rational basis analysis is applicable to this alienage-based classification. The Plyler majority merely notes that strict scrutiny does not apply. However, Justice Powell's concurrence in

Plyler indicated that the intermediate-scrutiny analysis should be used. 457 US 202, 239. Such standard requires that the classification be substantially related to a permissible state interest.[5]

Even applying the rational-basis analysis to this case, it is clear that the *Tarango* decision was erroneous. The Nevada Court determined that the rational-basis analysis is met because the undocumented aliens' presence in the United States is in itself a crime.[6] No other "legitimate government purpose" has been shown, as there simply is no state interest whatsoever expressed in either Nevada Revised Statures or elsewhere to justify the arbitrary denial of a part of workman's compensation benefits to a class of injured workers merely because of their

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[5] 457 U.S. 202, 239-240 provides: "Our review in a case such as these is properly heightened. 2 See id., at 767. Cf. Craig v. Boren, 429 U.S. 190 (1976). The classification at issue deprives a group of children of the opportunity for education afforded all other children simply because they have been assigned a legal status due to a violation of law by their parents. These children thus have been singled out for a lifelong penalty and stigma. A legislative classification that threatens the creation of an underclass of future citizens and residents cannot be reconciled with one of the fundamental purposes of the Fourteenth Amendment. In these unique circumstances, the Court properly may require that the State's interests be substantial and that the means bear a "fair and substantial relation" to these interests. 3 See Lalli v. Lalli, 439 U.S. 259, 265 (1978) ("classifications based on illegitimacy . . . are invalid under the Fourteenth Amendment if they are not substantially related to permissible state interests"); id., at 271 ("[a]s the State's interests are substantial, we now consider the means adopted")."

[6]The Nevada Supreme Court held: "Appellant Tarango is an undocumented alien. Unauthorized entry into the United States is a crime. Consequently, the United States Supreme Court has stated that benefits may be withheld 'from those whose very presence within the United States is the product of their own unlawful conduct.' As a result, we conclude that EICON's denial of appellant's vocational rehabilitation benefits was fairly related to a legitimate government purpose."
Id. at 183 *(citations and footnotes omitted).*

alienage. **The *Tarango* analysis gives the state carte blanche to discriminate against aliens for any reason, effectively denying equal protection to undocumented aliens by virtue of their status.**

Such reasoning has been expressly rejected by this Court, as the protections of the Fourteenth Amendment "apply to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 121 S. Ct. 2491, 2501, 150 L. Ed. 2d 653, 669 (2001) *(Citations omitted)*. The *Plyler* decision itself provided:

> It is the State's principal argument, and apparently the view of the dissenting Justices, that the undocumented status of these children *vel non* establishes a sufficient rational basis for denying them benefits that a State might choose to afford other residents. . . **we are unable to find in the congressional immigration scheme any statement of policy that might weigh significantly in arriving at an equal protection balance concerning the State's authority to deprive these children of an education.** . . in the area of special constitutional sensitivity presented by these cases, and in the absence of any contrary indication fairly discernible in the present legislative record, we perceive no national policy that supports the State in denying these children an elementary education. **The State may borrow the federal classification. But to justify its use as a criterion for its own discriminatory policy, the State must demonstrate that the classification is reasonably adapted**

> *Id.* at 224-227 (*emphasis added*), *citing Oyama v. California*, 332 U.S. 633, 664-665 (1948) (Murphy, J., concurring).

The *Plyler* Court further held that the following are not legitimate state interests which could justify classification: conservation of public resources, improving quality of service to other beneficiaries and low likelihood that the undocumented beneficiaries will remain in the state. *See Id.* at 228-231.

In the absence of an articulated ***legitimate*** state interest, the invidious discrimination perpetrated by EICON is unconstitutional.

B. EICON's Policy of Discrimination Against Undocumented Aliens Has A Disproportional Effect On The Hispanics.

In addition to being openly discriminatory against the undocumented aliens, EICON's actions have a disproportionate impact upon the Hispanic race. The predominant majority of the persons denied vocational rehabilitation based on lack of immigration authorization to work have been Hispanics. The undersigned counsel have represented numerous clients with respect to this widespread issue, all of whom have been Hispanics.

It is well-established that strict scrutiny equal protection analysis is applicable when classification involves race, alienage, or national origin. In *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313, (1985) this Court held:

> These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations

> These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy -- a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.
> *Id. at 441 citing McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Graham v. Richardson*, 403 U.S. 365 (1971).

While the classification may not necessarily be invalidated solely because of disproportional racial impact, an "invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." *Washington v. Davis*, 426 U.S. 229, 242 (1976).

In this case, EICON is aware that the consequences of their discriminatory policies are borne predominantly by Hispanics. Since EICON's actions are clearly discriminatory against Hispanics, and the Nevada Supreme Court did not make any findings of a compelling state interest which justifies the discrimination, the Nevada Court's decision in this case should be overruled.

II. Federal Law Does Not Preempt Nevada Workers Compensation Insurance Law With Respect To Vocational Rehabilitation.

A. There Is No "Express," "Field" Or "Conflict" Preemption Of Nevada Industrial Insurance Act By IRCA.

The *Tarango* court held: "we must conclude that because of the federal government's plenary power in the area of alienage, any legislation created by Congress - such as IRCA - preempts Nevada's workers' compensation laws as those laws have an effect on aliens in this state." *Id.* at 179. This finding is erroneous, as IRCA does not preempt the state workers' compensation law.

Under the Supremacy Clause of the U.S. Constitution, state law is preempted only when it conflicts specifically with a federal law. *U.S. Const. art. VI.* The courts held that are three circumstances in which state law is preempted by federal law: (a) where Congress expressly provides for preemption ("express preemption"); (b) where federal law completely occupies the field ("field preemption"); and (c) where there is a specific conflict between state and federal law ("conflict preemption"). *Cipollone v. Liggett Group, Inc.* 505 U.S. 504, 516, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992), Southern *Pac. Transp. Co. v. Public Util. Comm'n*, 9 F.3d 807, 810 (9th Cir. 1993).

Other state courts have held that there is no express preemption of state workers compensation laws by IRCA. In *Dowling v. Slotnik*, 244 Conn. 781, 792-793, 712 A.2d 396, 403 (S. C. Conn. 1998) the court emphasized:

> Section 1324a (h) (2), the express preemption provision of the Immigration

> Reform Act, only prohibits the states from imposing civil sanctions upon those who employ undocumented aliens. . . [an] award of workers' compensation benefits to the claimant does not constitute a civil sanction that is preempted by § 1324a(h), the express preemption provision of the Immigration Reform Act.

Likewise, IRCA does not occupy the field of workers compensation. Field preemption exists when federal law so thoroughly occupies a legislative field "as to make reasonable the inference that Congress left no room for the States to supplement it." *Fidelity Fed. Sav. & Loan Ass'n. v. de la Cuesta*, 458 U.S. 141, 153, 73 L. Ed. 2d 664, 102 S. Ct. 3014 (1982). This Court has ruled that only two federal statutes have this broad preemptive scope over the state laws of workers' compensation: § 301 of the Labor Management Relations Act, *Avco v. Aero Lodge No. 735*, 390 U.S. 557, 20 L. Ed. 2d 126, 88 S. Ct. 1235 (1968), and § 502(a)(1)(B) of the Employee Retirement Income and Security Act. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 95 L. Ed. 2d 55, 107 S. Ct. 1542 (1987)

As IRCA does not expressly preempt any state law and does not occupy the field of workers' compensation, this case may only involve the "conflict preemption." Conflict **preemption occurs where it is impossible to comply with both state and federal requirements**, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Metropolitan Life, supra*, 481 U.S. 58, 95 L. Ed. 2d 55, 107 S. Ct. 1542, *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287, 131 L. Ed. 2d 385, 115 S. Ct. 1483 (1995).

In this case, compliance with both the state law and IRCA presents no problem for EICON. It determined prior to learning of Franco's

undocumented status that the vocational rehabilitation in this case was to take the form of payment of money. IRCA does not prohibit payment of money to the aliens. This, compliance with both statutes is possible and requires **no special accommodation** of any kind. The second test for conflict preemption requires inquiry into the congressional intent. The relevant inquiry in the preemption analysis is whether there has been frustration of the purpose behind the specific federal statute at issue. *See, Rose v. Arkansas State Police*, 479 U.S. 1, 3-4, 93 L. Ed. 2d 183, 107 S. Ct. 334 (1986).

Excluding the undocumented aliens from labor and employment protection statutes, such as the law of workers' compensation, allows employers to exploit undocumented workers with impunity and weakens the rights of all workers. Recognizing this, the various federal labor and employment protection statutes are interpreted to apply equally to all workers, regardless of immigration status. IRCA was not intended as anti-employee legislation. To the contrary, in drafting the IRCA, Congress carefully avoided affecting employee rights and benefits statutes, leaving those in force as to the undocumented aliens.

Likewise, discussing the implied preemption of the state workers compensation law by IRCA, the *Dowling* court held:

> There is a strong presumption against federal preemption of state and local legislation. This presumption is especially strong in areas traditionally occupied by the states, such as public health and safety. . . The Immigration Reform Act itself gives no indication that Congress intended the act to preempt state laws whenever state laws operate to benefit

> undocumented aliens. . . **We conclude, therefore, that the Immigration Reform Act does not preempt, either expressly or impliedly, the authority of the states to award workers compensation benefits to undocumented aliens.**
> *Id.* at 794-797. (*Citations omitted*) (Emphasis added.)

Likewise, in *Reinforced Earth Co. v. Workers' Comp. App. Board,* 749 A.2d 136 (Comm. Ct. Pa. 2000), the court, holding that IRCA does not preempt the state workers compensation law, stated: "**the IRCA does not, in and of itself, preclude an illegal alien from being considered an "employee" for purposes of the [workers compensation] Act.**" (Emphasis added).

Similarly, in *Champion Auto Body v. The Industrial Claim Appeals Office,* 950 P 2d. 671 (Ct. App. Colo. 1998), the court held that while IRCA prohibits the employers from employing an undocumented alien, IRCA does not prohibit an undocumented alien from seeking or accepting employment in the United States. Therefore, the Champion court held that the award of workers compensation benefits to an undocumented alien was not a violation of IRCA (8 USC § 1324). The congressional intent in enacting IRCA was to prevent **employers** from hiring undocumented aliens.

Thus, there is no preemption of Nevada Industrial Insurance Act by IRCA, and the Nevada Supreme Court's conclusion to the contrary should be reversed.

B. McCarran-Ferguson Act precludes preemption of the Nevada Industrial Insurance Act by IRCA.

Under the McCarran-Ferguson Act, no act of Congress shall be construed to invalidate, impair, or supersede any State Law regulating or imposing a tax on the **business of insurance unless** such act specifically relates to such business. *See, United States v. South Eastern Underwriters Assoc.*, 322 US 533, 88 L. Ed. 1440, 64 S. Ct. 1162 (1944) and McCarran-Furguson Act, 15 USCS §§ 1011-1015. Inasmuch as IRCA (8 USCS § 1324(a)) does not specifically state that it relates to the business of insurance, it cannot preempt the industrial insurance law in Nevada.

For many years prior to 1944, insurance was uniformly regulated by the individual states. See, 43 Am.Jur.2d §37, p. 118. In 1944, the United States Supreme Court reversed this practice by holding that insurance transactions stretching across state lines constitute interstate commerce and, therefore, were subject to regulation by the Congress of the United States. *Id.* Based upon *United States v. South-Eastern Underwriters Assoc.*, 322 US 533, 88 L. Ed. 1440, 64 S.Ct. 1162 (1944), Congress shortly thereafter reacted to that decision by enacting the McCarran-Ferguson Act (15 USCS §§ 1011-1015), which provides that the business of insurance is subject to the laws of the several States which relate to the regulation and taxation of such businesses and that no Act of Congress shall be construed to invalidate, impair, or supersede any State law regulating or imposing a tax on the business of insurance unless such Act specifically relates to such business. Ibid. Congress codified that Act in 15 USCS § 1012, *supra.*

In *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 66 S.Ct. 1142, 90 L.Ed. 1342 (1946), the

In *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 66 S.Ct. 1142, 90 L.Ed. 1342 (1946), the Court held that the purpose of Congress in enacting the McCarran Act was broadly to "give support to the existing and future state systems for regulating and taxing the business of insurance." As to what constitutes "regulation" for the purposes of the McCarran Act so as to activate the Acts exemption, the District Court for the Northern District of California stated "This Court is of the opinion that a State regulates the business of insurance within the meaning of § 1012(b) when a State statute generally proscribes or permits or authorizes certain conduct on the part of the **insurance companies**." (Emphasis added).

The regulatory scheme set out in Chapter 616A-D of the NRS provides abundant evidence that the State of Nevada has a regulatory scheme for worker's compensation insurers that satisfies the McCarran Act. Nevada has a sufficient regulatory scheme to cloak itself from the effect of federal statutes, unless those federal statutes specifically relate to the business and regulation of insurance. For example, NRS Chapter 616, among other things, directs the scope and operation of worker's compensation insurers, provides for scope of coverage for injured workers, establishes the EICON and self-insured employers, directs the classification of insurers and the rates to be charged, and determines the extent of benefits available to injured workers.

Nevada has a comprehensive regulatory scheme in place with respect to worker's compensation insurance. Thus, the McCarran Act precludes federal preemption by immigration law, and the Nevada Court was incorrect in finding such preemption.

III. Public Policy Reasons Support Granting Vocational Rehabilitation Benefits To The Undocumented Aliens.

This case raises substantial public policy considerations regarding treatment of undocumented aliens. The denial of vocational rehabilitation benefits and other insurance affects not only the individual workers but also dependent members of their families, many of whom are US citizens. It also encourages unscrupulous employers to seek out these aliens and exploit them to cut costs on the industrial insurance premiums, which is specifically contrary to the intent of IRCA. As the court stated in *Dowling, supra,*

> there is no merit to the respondents' argument that providing workers' compensation benefits to undocumented aliens would stand as an obstacle to "removing the employment 'magnet' that draws undocumented aliens into the country." . . . excluding such workers from the pool of eligible employees would relieve employers from the obligation of obtaining workers' compensation coverage for such employees and thereby contravene the purpose of the Immigration Reform Act by creating a financial incentive for unscrupulous employers to hire undocumented workers. See Conn. Joint Standing Committee Hearings, Judiciary, 913 Sess., p. 124, remarks of Professor Willard C. Fisher ("unless the employer is required to pay the same [insurance premium for all workers] . . . he is . . . under inducement to take on [uncovered workers] . . . [the Workers' Compensation Act] must not . . . exclude aliens from the benefits; because there would be precisely

> the same inducement under such a provision for an employer to take on the men who are not citizens of the country"); Mendoza v. Monmouth Recycling Corp., 288 N.J. Super. 240, 247, 672 A.2d 221 (1996) ("immunity from accountability [under Workers' Compensation Act] might well have the further undesirable effect of encouraging employers to hire illegal aliens in contravention of the provisions and policies [of the Immigration Reform Act]"); Montoya v. Gateway Ins. Co., 168 N.J. Super. 100, 104, 401 A.2d 1102 (1979) (potential employers may be encouraged to employ illegal aliens if such aliens are unable to lodge claims based on injuries sustained); see also Sure-Tan, Inc. v. National Labor Relations Board, 467 U.S. 883, 893, 104 S. Ct. 2803, 81 L. Ed. 2d 732 (1984) (excluding illegal aliens from purview of National Labor Relations Act would provide incentive for employers to hire such workers); Patel v. Quality Inn South, supra, 846 F.2d 704 (excluding illegal aliens from purview of Fair Labor Standards Act would provide incentive for employers to hire such workers).(Emphasis added).
> *Id.* at 796-797.

Likewise, in *Patel v. Quality Inn South*, 846 F.2d 700 (llth Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989) at 704-05 the court stated:

> We recognize the seeming anomaly of discouraging illegal immigration by allowing undocumented aliens to recover in an action under the FLSA. We doubt, however, that many illegal aliens come to this country to gain the protection of our labor laws. Rather it is the hope of getting

> a job — at any wage — that prompts most illegal aliens to cross our borders. By reducing the incentive to hire such workers the FLSA's coverage of undocumented aliens helps discourage illegal immigration and is thus fully consistent with the objectives of the IRCA. We therefore conclude that undocumented aliens continue to be "employees" covered by the FLSA.

Likewise, in *Reinforced Earth Co., supra,* the court emphasized:

> it will not serve "public policy" to deny worker's compensation benefits to an illegal alien merely because of their immigration status, because all that would do is reward an employer who has failed to properly ascertain an employee's immigration status at the time of hire. Further, to do so would potentially subvert any public policy against illegal immigration because employers may actively seek out illegal aliens rather than citizens or legal residents because they will not be forced to insure against or absorb the cost of work-related injuries.

It is the objective of the workers compensation system to provide the workers with a financial and medical "safety net" in an event of an on-the-job injury. The undocumented injured workers gave up their rights to sue their employers in tort. If their workers compensation benefits are further curtailed, the injured workers would be left with no adequate remedy. The effect of such an outcome on the incapacitated workers and their dependents, many of whom are U.S. citizens, would be absolutely

devastating, as the undocumented workers are not in a financial position to bear the injury-related costs.

Unfortunately, throughout the history of this great nation, there have been those who have tried to deny rights to certain distinct segments of society based on racial or national origin differences. They were stopped cold in their tracks by our judicial system. Throughout our history, the system of justice has protected the rights of the underprivileged, poor, and those who could not speak for themselves, putting them on the equal footing with the rich and the powerful. We as a nation have always stood and will continue to stand for the principle that all people are created equal and entitled to the same freedoms and rights guaranteed by the Constitution.

In this case, this Court has a unique opportunity once again to ensure justice, dignity and the guarantee of equal protection. The applicant, Rosalio Franco, in this case represents a class of workers in the State of Nevada who have no voice. They are a class of laborers who do the hard work for less pay and are grateful for the opportunity. When these people get hurt while performing their jobs, they are denied the protections of workers compensation benefits that all others in our State are guaranteed. They are singled out for the sole reason that they cannot produce legal work documentation after they have been hurt, and are no longer able to work.

These clearly discriminatory practices serve no legitimate purpose and only allow the insurance companies to enjoy a windfall for not having to pay certain benefits to these injured workers. Our Nevada Supreme Court has stated that it is acceptable for an insurance company to offer benefits to the injured worker (after a full analysis has been done with regards to that person's entitlement) and then take those benefits away when proof of legal work status is

not provided, *even though there is no job placement involved.* This is the kind of invidious discrimination that our system of justice has fought against since the creation of this country. The people, whose rights have been taken away are the people who have no voice, who cannot speak for themselves. They are the part of our society who, even though are created equal, need a system of justice and people who stand by it to protect them from being harmed by those in power. These people live next door to the rest of us. We see them every day, hard at work for the benefit and growth of our society. We all enjoy the products of their labor. Their employers, who are in fact engaged in the activities illegal under IRCA, enjoy the profits from employing these people. Through this case, this Court once again should champion the rights guaranteed to people by the United States Constitution, to defend against invidious discrimination, and to ensure fairness, justice and dignity to each person. If this Court does not stand up for these people, no one else will. They will be walked upon and pushed aside, even though many of their children and spouses are United States' citizens. They will be much like the African-Americans were in the seventeen hundreds, slaves and no less, no more. We as a nation now know how wrong we were when slavery existed. Let us not repeat the mistakes of history, but rather treat all people equally.

Under Nevada law, persons suffering an injury at work are limited to the industrial insurance system of recovery. The documented and undocumented workers alike cannot sue their employers and obtain tort damages, this right having been replaced by the system of worker's compensation. In this particular case, Rosalio Franco does not have the right to sue his employer. He was also denied the full extent of the worker's compensation benefits, leaving him in a judicial vacuum where his rights are taken away without just compensation. That is a denial of due

process and a denial of the Fourteenth Amendment to the United States Constitution. This should not be tolerated.

CONCLUSION

Pursuant to the regulatory scheme set out in Chapters 616 and 617 of the NRS, Franco is clearly a covered employee with respect to worker's compensation benefits in the State of Nevada. He was granted the disputed benefits by EICON, offered a lump sum of money, and then denied said benefits solely because he could not provide an employment authorization document. Since Franco has permanent, physical restrictions and cannot return to his prior occupation, he is entitled to vocational rehabilitation benefits. Moreover, 8 USCS § 1324(a) does not preempt such State law, because this case deals with matters of insurance. From the standpoint of analyzing EICON's actions under equal protection, the invidious discrimination that results from EICON's action, vis a vis, documented and undocumented aliens, violates the equal protection clause of the 14th Amendment of the United States Constitution. Public policy also favors the granting of benefits in this case because to do otherwise, is to offer the employers an economic incentive to hire undocumented aliens.

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Franco, therefore, respectfully requests that the Nevada Supreme Court Decision at issue be reversed and Franco be provided rehabilitation benefits and/or a lump sum in lieu of such benefits as was the case prior to EICON' s improper determination.

DATED this 14th day of June, 2002.

Respectfully submitted,

MARTIN & ALLISON

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Las Vegas, NV 89128
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APPENDIX

NEOJ

Shirley D. Lindsey, Esquire
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(702) 671-7185
Attorney for Respondent Employers Insurance Company Of Nevada

DISTRICT COURT

CLARK COUNTY, NEVADA

ROSALIO FRANCO, Petitioner, vs. J.M. PAINTING & DRYWALL; STATE INDUSTRIAL INSURANCE SYSTEM, an Agency of the State of Nevada, and DEPARTMENT of ADMINISTRATION HEARINGS DIVISION APPEALS OFFICER, Respondent,	CASE NO: A 385557 DEPT. NO.:XII

NOTICE OF ENTRY OF ORDER DENYING PETITION FOR JUDICIAL REVIEW

Hearing Date: May 10, 1999
Hearing Time: 9:00 a.m.

TO: Michael J. Ryan, Esquire, Counsel for Petitioner; and

TO: Rosalio Franco, Petitioner.

YOU WILL PLEASE TAKE NOTICE that an Order was entered in the above entitled case on July 6, 1999.

A Copy of said Order is attached.

EMPLOYERS INSURANCE COMPANY OF NEVADA

/s
Shirley D. Lindsey, Esquire
Nevada Bar No: 000298
Associate General Counsel Legal Department
PO Box 26929
Las Vegas, NV 89126-0929

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 8th day of July, 1999, I served the above **NOTICE OF ENTRY OF ORDER** by depositing a true and correct copy thereof in an envelope with postage prepaid fully thereon at Las Vegas addressed to:

Rosalio Franco
1317 North 23rd, #4
Las Vegas, NV 89101

Michael J. Ryan Esquire
601 S. Ninth Street
Las Vegas, Nevada 89101

/s
An Employee of the Legal Dept.
Debbie L. Porrello

ORDD

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Attorney for Respondent
Employers Insurance Company Of Nevada

DISTRICT COURT

CLARK COUNTY, NEVADA

ROSALIO FRANCO, Petitioner, vs. J.M. PAINTING & DRYWALL; STATE INDUSTRIAL INSURANCE SYSTEM, an Agency of the State of Nevada, and DEPARTMENT of ADMINISTRATION HEARINGS DIVISION APPEALS OFFICER, Respondent,	CASE NO: A 385557 DEPT. NO.:XII

ORDER DENYING PETITION FOR JUDICIAL REVIEW

Date of Hearing: May 10, 1999
Time of Hearing: 9:00 a.m.

This matter came on for argument on May 10, 1999, in Department XII, the Honorable James C.

Mahan presiding, the Respondent, Employers Insurance Company of Nevada, represented by Creighton G. Oler, Esquire, Associate General Counsel, the Petitioner, Rosalio Franco, represented by Michael J Ryan, Esquire, the issue being fully argued by counsel and the Court fully advised in the premises and good cause appearing therefore,

ACCORDINGLY, IT IS ORDERED that the petition for Judicial Review is denied, and the Appeals Officer decision of February 25, 1998, (Appeal No. AOLV98-C-0995-D), is affirmed.

DATED this 2 day of June, 1999.

DISTRICT COURT JUDGE

/s
JAMES C. MAHAN

Submitted by,

EMPLOYERS INSURANCE COMPANY
OF NEVADA

/s
Shirley D. Lindsey, Esquire
Nevada Bar No: 000298
Associate General Counsel
Legal Department
PO Box 26929
Las Vegas, NV 89126-0929

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROSALIO FRANCO, Appellant, J.M. PAINTING & DRYWALL; AND EMPLOYERS INSURANCE COMPANY OF NEVADA, F/K/A STATE INDUSTRIAL INSURANCE SYSTEM, Respondents.	)	No. 34578 **FILED June 27, 2001**

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying judicial review and affirming an administrative appeals officer's determination that appellant is not entitled to vocational rehabilitation benefits.

Appellant Rosalio Franco is an undocumented worker who was injured while working for a Nevada employer. Although Franco received workers' compensation benefits under Nevada's Industrial Insurance Act, the State Industrial Insurance System (SIIS), now Employers Insurance Company of Nevada, denied Franco vocational rehabilitation benefits

because he could not establish his employment eligibility. Franco contends that he is entitled to vocational rehabilitation benefits notwithstanding his status as an undocumented worker. He is mistaken.

We recently held in Tarango v. SIIS[7], a case virtually indistinguishable factually, that SIIS must deny vocational rehabilitation benefits if vocational training is required solely because of immigration status. According to the record on appeal, except for his immigration status, Franco is employable in a light to medium duty job with some lifting restrictions. Franco is not, therefore, entitled to vocational rehabilitation, and SIIS properly closed his claim without providing such benefits. According, we

ORDER the judgment of the district court AFFIRMED.

/s _____, J.
Shearing

/s _____, J.
Agosti

/s _____, J.
Rose

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[1]117 Nev. ___, ____ P.3d ____ (Adv. Op. No. 40, June 13, 2001).

cc: Hon. James C. Mahan, District Judge
Greenman, Goldberg, Raby & Martinez
EICON General Counsel
Javier A. Arguello, EICON Assoc. Gen. Counsel
Shirley D. Lindsey, EICO Assoc. Gen. Counsel
Clark County Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROSALIO FRANCO,	)	No. 34578
	)	
Appellant,	)	
	)	**Filed August**
J.M. PAINTING & DRYWALL; AND EMPLOYERS INSURANCE COMPANY OF NEVADA, F/K/A STATE INDUSTRIAL INSURANCE SYSTEM,	)	**10, 2001**
	)	
Respondents.	)	

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

/s _____, J.
Shearing

/s _____, J.
Agosti

/s _____, J.
Rose

cc: Hon. James C. Mahan, District Judge
Greenman, Goldberg, Raby & Martinez
EICON General Counsel
Javier A. Arguello, EICON Assoc. Gen. Counsel
Shirley D. Lindsey, EICO Assoc. Gen. Counsel
Clark County Clerk

CONSTITUTIONAL AND STATUTORY PROVISIONS

Applicable Provisions of the United States Constitution.

The Fourteenth Amendment to the Constitution of the United States in relevant part provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Article VI, paragraph 2 of the Constitution of the United States provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. art. VI. paragraph 2.

Immigration Control and Reform Act ("IRCA"),
8 USC § 1324a provides: Unlawful employment of aliens.

(a) Making employment of unauthorized aliens unlawful

(1) In general. It is unlawful for a person or other entity -

[A] to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an

unauthorized alien (as defined in subsection (h)(3) of this section) with respect to such employment, or

(B) [i]to hire for employment in the United States an individual without complying with the requirements of subsection (b) of this section or (ii) if the person or entity is an agricultural association, agricultural employer, or farm labor contractor (as defined in section 1802 of title 29), to hire, or to recruit or refer for a fee, for employment in the United States an individual without complying with the requirements of subsection (b) of this section.

(2) Continuing employment. It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

McCarran-Furguson Act, 15 USCS § 1012 provides:

(a) State regulation. The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation. No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the

purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, that after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act [15 USCS § 1 et seq.], and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended [15 USCS §§ 41 et seq.], shall be applicable to the business of insurance to the extent that such business is not regulated by State law. (Mar. 9, 1945, ch 20, § 2, 59 Stat. 34; July 25, 1947, ch 326, 61 Stat. 448.)

The **NEVADA INDUSTRIAL INSURANCE ACT**, NRS Chapters 616A-D, in pertinent part provides:

NRS 616A.105. "Employee" and "workman" defined. "Employee" and "workman" are used interchangeably in chapters 616A to 616D, inclusive, of NRS and mean every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and include, but not exclusively:

1. Aliens and minors.

NRS 616C.590. Eligibility for services; effect of incarceration; effect of refusing services offered by insurer; effect of inability of insurer to locate injured employee.

1. Except as otherwise provided in this section, an injured employee is not eligible for vocational rehabilitation services, unless:

(a) The treating physician or chiropractor approves the return of the injured employee to work but imposes permanent restrictions that prevent the injured employee from returning to the position that he held at the time of his injury;

(b) The injured employee's employer does not offer employment that the employee is eligible for considering the restrictions imposed pursuant to paragraph (a); and

(c) The injured employee is unable to return to gainful employment at a gross wage that is equal to or greater than 80 percent of the gross wage that he was earning at the time of his injury.

NRS 616C.595. Agreements for payment of compensation in lump sum in lieu of provision of vocational rehabilitation services.

1. If an injured employee is eligible for vocational rehabilitation services pursuant to NRS 616C.590, the insurer and the injured employee may, at any time during the employee's eligibility for such services, execute a written agreement providing for the payment of compensation in a lump sum in lieu of the provision of vocational rehabilitation services. An insurer's refusal to execute such an agreement may not be appealed.

2. If the insurer and the injured employee execute an agreement pursuant to subsection 1, the acceptance of the payment of compensation

in a lump sum by the injured employee extinguishes his right to receive vocational rehabilitation services under his claim. Except as otherwise required by federal law, an injured employee shall not receive vocational rehabilitation services from any state agency after he accepts payment of compensation in a lump sum pursuant to this section.

NRS 616C.530. Priorities for returning injured employee to work. An insurer shall adhere to the following priorities in returning an injured employee to work:

1. Return the injured employee to the job he had before his injury.

2. Return the injured employee to a job with the employer he worked for before his accident that accommodates any limitation imposed by his injury.

3. Return the injured employee to employment with another employer in a job that uses his existing skills.

4. Provide training for the injured employee while he is working in another vocation.

5. Provide formal training or education for the injured employee in another vocation.

117 Nev. Adv. Op. No. 40

June 13, 2001

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 34462

ANGEL TARANGO,

Appellant,

vs.

STATE INDUSTRIAL INSURANCE SYSTEM, AN AGENCY OF THE STATE OF NEVADA, N/K/A EMPLOYERS INSURANCE COMPANY OF NEVADA; AND CHAMPION DRYWALL,

Respondents.

Appeal from an order of the district court denying appellant's petition for judicial review. Eighth Judicial District Court, Clark County; James C. Mahan, Judge.

Affirmed.

MAUPIN, C.J., dissented in part.

Greenman, Goldberg, Raby & Martinez and Esther Rodriguez and Lisa M. Anderson, Las Vegas, for Appellant.

Kimberly A. Wanker, Ltd., Henderson, for Respondent Champion Drywall.

Javier A. Arguello, Associate General Counsel, Las Vegas, for Respondent Employers Insurance Company of Nevada.

Gugino & Schwartz and John P. Lavery, Las Vegas, for Amicus Curiae Nevada Contractor's Network Self-Insured Group.

BEFORE THE COURT EN BANC.

O P I N I O N

By the Court, LEAVITT, J.:

This appeal is from an order of the district court denying a petition for judicial review. Appellant Angel Tarango is an undocumented worker who was injured during the course of his employment with a Nevada employer. Although Tarango received workers' compensation benefits under Nevada's Industrial Insurance Act, he was denied vocational rehabilitation benefits. The primary question presented on appeal is whether an undocumented alien is precluded from receiving vocational training under Nevada's workers' compensation scheme if those benefits would be in violation of federal law, state law, or the Equal Protection Clause. We conclude that although compensation can be paid to an injured undocumented worker pursuant to the state's workers' compensation scheme, formal vocational training must be denied if that training is required solely because of immigration status. Therefore, we affirm the district court's order awarding Tarango permanent partial disability payments, but denying him vocational rehabilitation benefits.

FACTS

Appellant Tarango suffered an industrial injury in January 1996 after he fell from an eight-foot ladder

while putting up drywall. Tarango was taken to a University Medical Center Quick Care facility, and there he was diagnosed with a lumbosacral sprain. By early 1997, Tarango's physician stated that Tarango had received maximum medical treatment, and Tarango was cleared to return to the workforce. However, because of the injury, Tarango was limited to permanent medium duty work in which he was to lift no more than fifty pounds. Since Tarango's position with Champion Drywall required more vigorous activity than Tarango's medical clearance would allow, Tarango's physician recommended vocational rehabilitation.

In June 1997, insurer State Industrial Insurance System (SIIS) awarded Tarango permanent partial disability (PPD) based upon a ten percent whole person impairment. Additionally, because of the permanent work restrictions placed upon him, Tarango also applied for vocational rehabilitation benefits, pursuant to NRS 616C.530.

Commensurate with federal law, however, SIIS issued a written determination stating that before Tarango could receive vocational rehabilitation benefits, he was required to submit Immigration and Naturalization Form I-9. The form is required as proof of an alien's legal right to work in the United States. When Tarango failed to satisfy the verification requirement, SIIS suspended his benefits until such proof could be presented.

In two separate proceedings in August and October, 1997, a hearing officer affirmed both the SIIS decisions to award Tarango ten percent PPD, and to deny Tarango vocational rehabilitation benefits absent proof of a legal right to work.

On appeal of the hearing officer's determination, the appeals officer held that the ten percent PPD award

was supported by the totality of the documentary evidence. Further, the appeals officer determined that federal law supported SIIS's denial of vocational rehabilitation benefits. Specifically, the appeals officer stated that the federal Immigration Reform and Control Act1 (IRCA) - which prohibits individuals, entities, or state agencies from providing employment opportunities for illegal aliens - preempted SIIS's duties to provide Tarango with vocational rehabilitation benefits under NRS 616C.530.

Tarango's subsequent petition for judicial review was denied by the Honorable James C. Mahan on May 26, 1999. The district court held that there was substantial evidence in the record to support the appeals officer's decision. Tarango now appeals.

DISCUSSION

This is a case of first impression. The Nevada Industrial Insurance Act (NIIA) states that an employee or worker includes "every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed."2 Therefore, Nevada's workers' compensation laws apply to all injured workers within the state, regardless of immigration status. However, the issue before this court is not whether Tarango can receive workers' compensation under our laws; rather, we must determine whether an injured undocumented worker's access extends to the full depths of the workers' compensation scheme.

Unlike compensatory benefits which award monetary relief, vocational rehabilitation benefits are designed to return the injured worker to the workforce by helping him obtain employment within his physical abilities. We conclude that if Champion Drywall provided Tarango with modified employment, Champion Drywall

would be circumventing the IRCA. Further, if SIIS provided Tarango with vocational rehabilitation benefits to obtain further training, SIIS would be violating state law and the Equal Protection Clause.

It is well settled that Congress has the power to impose alienage legislation on the states.3 Moreover, it is well established that immigration legislation "is unquestionably exclusively a federal power."4 Although the states do have some authority to deal with aliens in a manner that "mirrors federal objectives and furthers a legitimate state goal," state interests must ultimately give way to the federal government's broad power to regulate matters of alienage.5

Congressional power to oversee immigration stems from a variety of sources. Primarily, the United States Constitution grants Congress the authority to "establish an uniform Rule of Naturalization."6 Further, Congress has plenary power with respect to both foreign relations and global commerce.7 These powers, coupled with the inherent authority of the sovereign to close its borders, have created an intricate scheme governing the admission and status of aliens within the United States.8

The United States Supreme Court has expanded this authority further by recognizing the power as plenary, or "largely immune from judicial inquiry and interference."9 Specifically, the Court has stated that the "obvious need for delicate policy judgments has counseled the Judicial Branch to avoid intrusion into this field."10 Similarly, the Court has held that "it is the business of the political branches of the Federal Government, rather than that of either the States or the Federal Judiciary, to regulate the conditions of entry and residence of aliens."11 This power not only extends to the admission and naturalization of aliens, but also to the "regulation of their conduct before naturalization."12 As a result, we must conclude that

because of the federal government's plenary power in the area of alienage, any legislation created by Congress - such as the IRCA - preempts Nevada's workers' compensation laws as those laws have an effect on aliens in this state.

The IRCA was designed by Congress to establish procedures that make it more arduous to employ unauthorized aliens, and to punish those employers who knowingly offer jobs to unauthorized aliens.13 The Act defines an "unauthorized alien" as an individual who is not "lawfully admitted for permanent residence, or . . . authorized to be so employed" in the United States.14

Specifically, the Act precludes employers not only from hiring unauthorized aliens, but also from continuing to employ those workers once the employer becomes aware of the employee's illegal status.15 Violators are punished with substantial fines as well as possible imprisonment.16

We conclude that because Tarango could not substantiate his legal right to work with an Immigration and Naturalization Form I-9, he squarely fell into Congress' definition of an "unauthorized alien." As a result, Champion Drywall could no longer continue to employ Tarango - once Tarango's undocumented status was determined - without violating the IRCA and incurring federal penalties.

We note, however, that although the language of the IRCA focuses on punishing the employer of unauthorized aliens, or those agencies that refer unauthorized aliens for a fee, the Act does not provide a reference point for the insurer's role. SIIS is not employing Tarango or referring him for a fee. Thus, it is our view that although SIIS would be facilitating future employment for an unauthorized alien by providing vocational rehabilitation benefits, there is no

indication that SIIS is prohibited or would be punished under the IRCA for its involvement. Further, we do not consider it outside the realm of possibility that appellant's future employment lies outside the boundaries of the United States, and such vocational training could be put to use elsewhere.

Nonetheless, we conclude that SIIS is precluded from providing vocational training pursuant to state law. The state law in question is NRS 616C.530. The statute provides:

An insurer shall adhere to the following priorities in returning an injured employee to work:

1. Return the injured employee to the job he had before his injury.

2. Return the injured employee to a job with the employer he worked for before his accident that accommodates any limitation imposed by his injury.

3. Return the injured employee to employment with another employer in a job that uses his existing skills.

4. Provide training for the injured employee while he is working in another vocation.

5. Provide formal training or education for the injured employee in another vocation.17

We have held in the past that "[t]he intent of the legislature is the controlling factor in statutory interpretation."18 Here, NRS 616C.530 declares itself to be based on priority, and as a result, we conclude that the intent of the legislature is clear and should be given its ordinary meaning.19 Thus, the statute provides that the insurer shall first attempt to return

the injured worker to his former job, and lastly, the insurer shall provide formal training or education.20

In this instance, SIIS determined to deny all vocational training benefits because Tarango failed to provide proof of his lawful right to work in the United States. We conclude that this determination was in harmony with the IRCA and NRS 616C.530.

Foremost, if Tarango was a documented worker, he clearly could have returned to similar employment in the United States. Tarango was not incapacitated. Rather, the record indicates that the only limitation on Tarango's abilities was that he should lift no more than fifty pounds.

Tarango's ability to work placed SIIS in a precarious position. First, SIIS could have returned Tarango to the workforce in a capacity provided by NRS 616C.530, and thereby caused an employer to violate the IRCA by hiring Tarango. Second, SIIS could have ignored the priority scheme established by the legislature in the vocational rehabilitation statute and awarded Tarango formal training based solely on his illegal status. Or third, SIIS could have denied all vocational rehabilitation benefits. We conclude that the latter option was the only logical choice.

As to the first alternative, Tarango's injury prevented him from returning to Champion Drywall in his former role. Therefore, NRS 616C.530(1) was never at issue. However, NRS 616C.530(2) and (3) were clearly applicable. Because Tarango could return to the workforce in a limited role, SIIS was required by the priority scheme to return Tarango to Champion Drywall or to a similarly situated employer. Yet, as previously noted, such placement by SIIS would have required the employer to knowingly violate the IRCA and incur substantial penalties. Although SIIS would not have incurred those penalties, we conclude that

this alternative would have led to an illogical and absurd result.21

Under the second alternative, SIIS would be required to ignore the priority scheme established by the legislature in NRS 616C.530 and to provide Tarango with formal training based solely on his illegal status.22 Yet, we conclude that the agency's authority is not so broadly extended. Although SIIS is "impliedly clothed with power to construe the relevant laws and set necessary precedent to administrative action," it is not permitted to circumvent the legislature's clear intent in creating the prioritized rehabilitation scheme.23

Further, we fail to comprehend how providing Tarango with formal training would create more efficiency in the workers' compensation system. The system is designed to "ensure the quick and efficient payment of compensation to injured and disabled employees at a reasonable cost to the employers."24 Awarding Tarango formal vocational training under NRS 616C.530(4) and (5) diametrically opposes the express intent of our workers' compensation scheme.

Specifically, NRS 616C.530(4) necessitates providing Tarango with formal vocational training that runs concurrent with his employment. The IRCA prohibits Tarango's employment in the United States. Thus, SIIS would be required to provide training outside of Nevada. The NIIA was not intended as a means to expand the agency's powers to award vocational benefits beyond the borders of Nevada – let alone the borders of the United States.25

Likewise, it is our view that dangerous precedent is set in allowing an undocumented worker to skip through the priority scheme directly to NRS 616C.530(5). Under this option, SIIS would be required to offer Tarango formal training for a different vocation outside

the United States. However, it is clear that this training would only be available to Tarango because of his undocumented status. If he were a legal worker, this option would never become available.

More importantly, by allowing an undocumented worker to advance to NRS 616C.530(5) – without regard for his injuries – this court would be providing a pathway that would lead all injured undocumented workers to the most expensive remedy provided under the scheme. The formal vocational training "would bear no relationship to 'medical eligibility,' the extent of disability or need for retraining."26 Not only would the costs of such training create an excessive burden on SIIS and the employers of Nevada, but it would also undermine the purpose behind Nevada's workers' compensation scheme.

Vocational rehabilitation was designed to provide methods to promptly return the employee to the workforce. But here, Tarango would not be using the scheme to return to his former or a similar job. Rather, he would be using Nevada's workers' compensation scheme as an avenue to a better career. This was not the intent of the legislature. The legislature intended a priority scheme to be established in order to provide efficiency and cost-effectiveness. "[W]hen the language of a statute is plain, its intention must be deduced from such language, and the court has no right to go beyond it."27 As a result, we conclude that SIIS properly denied Tarango's vocational rehabilitation claim because of his undocumented status.

It should be noted that Tarango also contends that SIIS's denial of his vocational rehabilitation benefits violates the 14th Amendment. We disagree.

The 14th Amendment to the United States Constitution states that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.28

In analyzing the language of the 14th Amendment, the United States Supreme Court has recognized that aliens are considered "persons" for purposes under that amendment.29 Further, the Court has held that the amendment's phrase "within its jurisdiction" emphasizes that the umbrella of equal protection covers "all within a State's boundaries, and to all upon whom the State would impose the obligations of its laws."30 Therefore, aliens - whether documented or undocumented - are to be provided such protections.31 And as a result, appellant contends that because SIIS is a governmental agency acting as an arm of the State of Nevada, it must comply with the Equal Protection Clause even when administering workers' compensation benefits to undocumented workers. We agree.

In considering an equal protection challenge, the court must first determine the appropriate standard of review. This court's standard for examining the validity of legislation under the Equal Protection Clause is the same as the federal standard.32 Thus, the proper standard of review depends on the classification to be considered, and the appropriate level of scrutiny to be applied to the affected interest.33

The highest level of scrutiny - strict scrutiny - is applied in cases involving fundamental rights or a suspect class.34 Under strict scrutiny, legislation should only be upheld if it is necessary to advance a compelling state interest, and it is narrowly tailored to achieve that interest.35

Comparatively, a lesser standard of review is required when the classification does not affect fundamental liberties.36 Under this level of scrutiny, legislation meets its burden of review so long as it is rationally related to a legitimate government interest.37 The "rational basis test" generally presumes that the law is constitutional, and thus, the courts show deference to the legislation.38

Between these two standards of review lies an intermediate level of scrutiny, which generally has been applied to matters of gender or illegitimacy.39

Appellant contends that the standard of review should meet that of a compelling state interest. Under the due process guarantee, the courts will require a compelling interest whenever laws distinguish persons based on classification.40 Thus, "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny."41 This court has applied similar reasoning in affording aliens the protection of strict scrutiny review.42

However, although we conclude that undocumented aliens have a right to equal protection under the 14th Amendment, the United States Supreme Court has "reject[ed] the claim that 'illegal aliens' are a 'suspect class.'"43 To the contrary, entry into the undocumented alien classification is not done by some involuntary action such as entry into suspect classifications based on minority or origin. Rather, the Court has stated that "entry into this class, by virtue of entry into this country, is the product of voluntary action. Indeed, entry into the class is itself a crime."44

As a result, the Plyler Court refused to acknowledge undocumented aliens as a suspect class, and in doing so, the Court stated that deference must be given to the legislature in determining classification schemes

for those illegally in the United States.45 Further, the Court held that state legislation concerning those individuals must only include "some fair relationship to a legitimate public purpose."46 Consequently, it is our view that state action disfavoring undocumented aliens with disparate treatment is not prohibited so long as the legislation is fairly related to a legitimate state purpose.47

Here, the priority scheme of NRS 616C.530 was designed by the legislature with the intent to efficiently return injured employees back into the workforce. If SIIS were required to offer Tarango vocational training merely because Tarango was illegally in the country, he would unfairly benefit from services prohibited to all legal workers solely because of his undocumented status.48 Such a consequence would result in disparate treatment of those lawfully entitled to work in Nevada, and would be in violation of the Equal Protection Clause since all those similarly situated must be treated in a like manner.49

Appellant Tarango is an undocumented alien. Unauthorized entry into the United States is a crime.50 Consequently, the United States Supreme Court has stated that benefits may be withheld "from those whose very presence within the United States is the product of their own unlawful conduct."51 As a result, we conclude that SIIS's denial of appellant's vocational rehabilitation benefits was fairly related to a legitimate government purpose.

CONCLUSION

We conclude that the IRCA preempts Nevada's workers' compensation scheme in so far as it provides undocumented aliens with employment within the boundaries of the United States. Further, the legislature's priority scheme under NRS 616C.530, and the Equal Protection Clause, preclude SIIS from

awarding formal vocational training to undocumented workers. As a result of these conclusions, we affirm the order of the district court awarding appellant permanent partial disability, but denying appellant vocational rehabilitation benefits.

YOUNG, AGOSTI, ROSE and BECKER, JJ., concur.

**********FOOTNOTES**********

1 8 U.S.C. § 1324a (1998).

2 NRS 616A.105 (emphasis added).

3 See Free v. Bland, 369 U.S. 663, 666 (1962).

4 See De Canas v. Bica, 424 U.S. 351, 354 (1976); see also Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948).

5 Plyler v. Doe, 457 U.S. 202, 219 n.19, 225 (1982) (citing De Canas, 424 U.S. 351).

6 U.S. Const. art. I, § 8, cl. 4.

7 See id.; Mathews v. Diaz, 426 U.S. 67, 81 n.17 (1976).

8 See Plyler, 457 U.S. at 225; see also Harisiades v. Shaughnessy, 342 U.S. 580 (1952).

9 Harisiades, 342 U.S. at 588-89.

10 Plyler, 457 U.S. at 225.

11 Mathews, 426 U.S. at 84.

12 Takahashi, 334 U.S. at 419.

13 See Dowling v. Slotnik, 712 A.2d 396, 404 (Conn. 1998).

14 8 U.S.C. § 1324a(h)(3).

15 See 8 U.S.C. § 1324a(a)(2).

16 See 8 U.S.C. at § 1324a(e)(4), (f)(1).

17 NRS 616C.530.

18 Cramer v. Peavy, 116 Nev. 575, 580, 3 P.3d 665, 669 (2000) (quoting Cleghorn v. Hess, 109 Nev. 544, 548, 853 P.2d 1260, 1262 (1993)).

19 See City Council of Reno v. Reno Newspapers, 105 Nev. 886, 891, 784 P.2d 974, 977 (1989).

20 NRS 616C.530. "[I]n statutes, 'may' is permissive and 'shall' is mandatory unless the statute demands a

different construction to carry out the clear intent of the legislature." S.N.E.A. v. Daines, 108 Nev. 15, 19, 824 P.2d 276, 278 (1992).

21 Statutory interpretation should avoid absurd or unreasonable results. General Motors v. Jackson, 111 Nev. 1026, 1029, 900 P.2d 345, 348 (1995).

22 NRS 616C.530(4)–(5).

23 SIIS v. Miller, 112 Nev. 1112, 1118, 923 P.2d 577, 581 (1996). "SIIS is clearly a state agency for the following reasons: (1) it is subject to the approval and control of the Governor, the legislature, and other agencies of the government; (2) it is treated as the State or a state agency throughout the Nevada Revised Statutes; and (3) it possesses certain powers of a sovereign authority." Northern Nev. Ass'n Injured Workers v. SIIS, 107 Nev. 108, 112-13, 807 P.2d 728, 731 (1991) (emphasis added) (footnotes omitted).

24 NRS 616A.010.

25 NRS 616C.580 states that "[e]xcept as otherwise provided in this section, vocational rehabilitation services must not be provided outside of this state."

26 Del Taco v. Workers' Comp. App. Board, 94 Cal. Rptr. 2d 825, 828-29 (Cal. Ct. App. 2000).

27 Cirac v. Lander County, 95 Nev. 723, 729, 602 P.2d 1012, 1015 (1979) (quoting State ex rel. Hess v. The County Commissioners of Washoe County, 6 Nev. 104, 107 (1870)).

28 U.S. Const. Art. XIV, § 1. (Emphasis added.)

29 See Plyer, 457 U.S. at 210.

30 Id. at 214.

31 See id.

32 See Laakonen v. District Court, 91 Nev. 506, 538 P.2d 574 (1975).

33 See Gaines v. State, 116 Nev. 359, 998 P.2d 166 (2000).

34 See id.

35 See id.

36 See id.

37 See Sereika v. State, 114 Nev. 142, 143-45, 955 P.2d 175, 179 (1998).

38 See Plyler, 457 U.S. at 216.
39 See Clark v. Jeter, 486 U.S. 456, 461 (1988).
40 See Graham v. Richardson, 403 U.S. 365, 371-72 (1971).
41 Id. at 372; see also U.S. v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).
42 See State v. Chumphol, 97 Nev. 440, 441, 634 P.2d 451, 451 (1981).
43 Plyler, 457 U.S. at 219 n.19.
44 Id.
45 See id. at 216.
46 Id.
47 Id.
48 All employees legally working in Nevada who could return to work in a modified role would be precluded from formal training. Based on the vocational rehabilitation priority scheme, NRS 616C.555(2) provides: "If the counselor determined . . . that the injured employee has existing marketable skills, the plan [for vocational rehabilitation benefits] must consist of job placement assistance only." (Emphasis added.)
49 See Romer v. Evans, 517 U.S. 620, 631-35 (1996); see also Del Taco, 94 Cal. Rptr. 2d at 828-29. The Del Taco court concluded that awarding injured undocumented aliens vocational training not commensurate with injuries violated the Equal Protection Clause as to the employer as well as third parties not before the court. See id. Specifically, the court stated that requiring the employer to pay more in workers' compensation for an undocumented worker who was injured than a legal worker solely because of immigration status was "irrational and arbitrary" and violated the Clause. Id.
50 See 8 U.S.C. § 1325(a).
51 Plyler, 457 U.S. at 219.

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SHEARING, J., concurring:

I agree with Chief Justice Maupin's analysis of the law; however, I do not agree that a remand is required "for a more fact-intensive determination."

The record is clear that Angel Tarango is employable in his present condition. SIIS has already found that he is fully capable of employment, but is only restricted from lifting over fifty pounds. He has been compensated for this ten percent disability. He can work but just not at a job requiring lifting more than fifty pounds and not legally in this country. Therefore, he is not eligible for rehabilitation benefits.

I agree with the majority in affirming the judgment of the district court.

****

MAUPIN, C.J., concurring and dissenting:

Angel Tarango is an undocumented alien worker who was severely injured in the course and scope of his employment with a Las Vegas drywall contractor. After collecting wage, medical, and disability benefits, he submitted a claim for vocational rehabilitation to the SIIS.1 An administrative appeals officer upheld denial of the claim on the ground that providing rehabilitation services to Mr. Tarango would violate the federal Immigration Reform and Control Act ("IRCA") of 1986. The district court denied Mr. Tarango's petition for judicial review of that decision.

I would remand this matter for a more fact-intensive determination of his actual ability to undertake substitute employment given his physical limitations. If he is actually employable apart from his immigration status and despite his physical disability, I agree he is ineligible for retraining and rehabilitation under our

workers' compensation laws. If re-employment is not feasible apart from his immigration status, he should be entitled to rehabilitation benefits because IRCA, in my view, does not per se preempt state laws allowing participation in the legal aspects of a rehabilitation program.

Legality of vocational rehabilitation benefits

The majority correctly observes that, under the priorities of NRS 616C.530, legal workers may not receive the benefits of a rehabilitation program if they can re-enter the workforce in one of the enumerated capacities. Accordingly, if Mr. Tarango would be re-employable but for his undocumented status, he would be ineligible as a matter of state law for retraining and rehabilitation. Thus, if Mr. Tarango is physically re-employable, his forced admission into a rehabilitation program provided under NRS 616C.530 would be mandated only because of his illegal status. This, as also noted by the majority, would be manifestly unfair. Certainly, what is illegal for a documented worker must be illegal for an undocumented worker. I therefore further agree that there is no impediment under the state or federal constitutions to his exclusion from a program under this alternative.

As noted below, however, the analysis of eligibility under state law changes if Mr. Tarango is not, in any event, able to pursue re-employment or substitute employment.

Preemption

The majority concludes that IRCA preempts the Nevada Industrial Insurance Act ("NIIA") merely because it may have an effect on aliens working in the State of Nevada. On the other hand, the majority observes that there is no indication that the SIIS is

prohibited from or would be punished under IRCA for providing certain rehabilitation services to Mr. Tarango. While I agree with the second position taken by the majority, I disagree with the first and conclude that IRCA does not preempt the provisions of the NIIA that provide rehabilitation services, short of job placement, to an undocumented alien. Without preemption, there is no federal prohibition against Mr. Tarango's participation in a program that does not violate IRCA.

It is true that, under the Supremacy Clause2 of the United States Constitution, any state law in conflict with federal law must yield to the federal mandate. However, the United States Supreme Court has always exercised restraint and caution in determining whether a particular state law conflicts with federal law.3 Indeed, in Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.,4 the Court stated that "[p]re-emption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons -- either that the nature of the regulated subject matter permits no other conclusion or that the Congress has unmistakenly so ordained.'"

As discussed in De Canas v. Bica,5 the United States Supreme Court employs a three-part test to determine whether federal law must preempt state law. First, federal law preempts state law when a state purports to regulate an area exclusively reserved for the federal government.6 Second, federal law preempts state law if Congress has sought to occupy the field: that is, when Congress clearly intends to oust state authority to regulate that type of conduct, even if the state regulation is consistent with federal objectives.7 Third, federal law preempts state law if it "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"8 Failure on any one of these three tests results in federal preemption.

There is no real dispute in this case that the NIIA rehabilitation scheme satisfies the first two tests. Nevada clearly has the authority to protect its workers (lawfully and unlawfully employed) under a no-fault workers' compensation system. This notwithstanding, all three tests are discussed below.

Under the first De Canas test, we must determine whether the state enactment that in some way impacts aliens is a regulation of immigration. Because the power to regulate immigration is exclusively a federal power, state statutes that regulate immigration are constitutionally proscribed.9 In this instance, the NIIA provides benefits for all employees, undocumented or otherwise.10 However, the De Canas Court emphasized that a state enactment does not automatically equate to a regulation of immigration, and ipso facto preemption of state law, because it deals in some manner with aliens.11 The Supreme Court noted that state statutes should not be branded as regulatory merely because the legislation has "some purely speculative and indirect impact on immigration."12 The NIIA rehabilitation scheme is intended to provide certain benefits to all Nevada workers; it does not, in any respect, purport to regulate immigration.

Likewise, under the second De Canas test, it cannot be said that there is any manifestation of Congress's intent to oust state authority to rehabilitate undocumented injured workers.13 Prior to IRCA's enactment, it was long established that undocumented alien workers were able to collect workers' compensation benefits.14 Had Congress intended to preclude states from continuing to provide these benefits, it could have explicitly done so under IRCA.

In my view, only the third De Canas test, i.e., whether the state law stands as an obstacle to the

accomplishment and execution of the full purposes and objectives of Congress, provides an arguable basis for federal preemption. However, I do not believe that the rehabilitation of undocumented workers under the NIIA interferes with federal legislative objectives.

Congress enacted IRCA in an effort to reduce the illegal immigration of alien workers to the United States.15 Recognizing that the most effective method of discouraging illegal immigration is to make undocumented workers less attractive employees, Congress criminalized the employer's side of the employment relationship. This policy is underscored by the legislative history of the federal act:

Employment is the magnet that attracts aliens here illegally or, in the case of nonimmigrants, leads them to accept employment in violation of their status. Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally or violating their status in search of employment.16

Thus, IRCA makes it unlawful "to [knowingly] hire, or to recruit or refer for a fee," any unauthorized alien for employment in the United States.17 IRCA does not, however, "reduce the legal protections and remedies for undocumented workers under other laws."18 Indeed, to do so would "exacerbate the appeal of illegal workers to unscrupulous employers," and directly contravene Congress's intent in enacting IRCA.19 I wish to note in this connection that there is no evidence of any untoward behavior by this employer. This, however, does not change the policy behind preserving certain protections afforded to undocumented workers.

In contrast, beyond the placement of a worker in new or substitute employment, the NIIA contains no requirement affecting alien workers that would

constitute illegal misconduct under IRCA. Rather, the NIIA primarily alters a worker's ability to sue his employer in tort in exchange for "no-fault" employment benefits. Under NIIA, "[t]he employee forfeits his common-law right to sue his employer for negligence, while the employer gives up most common-law defenses."20 The purpose of this statutory construct is to efficiently provide compensation to workers for injuries suffered as the result of their employment.21 Absent a workers' compensation scheme, an undocumented worker, like a documented one, could sue his employer in a common law tort action. His immigration status would be no bar to such a suit.22 By simply replacing the employee's negligence cause of action with the workers' compensation scheme, Nevada does not encourage illegal immigration; instead, it merely provides a vehicle to compensate for workplace injuries. Thus, the NIIA does not stand as an obstacle to the accomplishment and execution of the purposes and objectives of IRCA.23

The NIIA provides the following options to the workers' compensation insurer: (1) return the employee to his original position; (2) return the employee to the original position in a modified role; (3) return the employee to employment with another employer in order to make use of his existing skills; (4) provide formal retraining while he works in another profession; and (5) provide formal training or education for a new vocational endeavor.24

I agree that substitute employment under the NIIA rehabilitation scheme would violate IRCA. However, as the majority seemingly agrees, the SIIS need not violate IRCA under the facts of this case. Because Mr. Tarango's prior job requires more vigorous work than his permanent disability permits, he is eligible for vocational retraining under Nevada law if he is otherwise not medically eligible for re-employment or substitute employment.25 Vocational retraining does

not entail job placement or referral of an undocumented worker for a fee. Providing a pure rehabilitation program to someone injured while in the service of a domestic employer does not per se violate the act and, certainly, the Immigration and Naturalization Service can deport him at any time.26

Thus, I disagree that Mr. Tarango is absolutely barred from eligibility. If he is medically ineligible for re-employment because of the nature of his work-related injuries, he should be eligible to participate in a legal rehabilitation program if the department of immigration would let him do so. Again, however, if found to be re-employable on a substitute basis or otherwise, Mr. Tarango is precluded from participation in any rehabilitation program legally unavailable to legal workers.

I would therefore hold that IRCA does not preempt the NIIA. If IRCA does not preempt the NIIA in this instance, there is no federal impediment preventing the SIIS from awarding rehabilitation benefits short of placement in the workforce. Hence, I would reverse and remand this matter with instructions for the district court to order the SIIS to reconsider Mr. Tarango's request for vocational retraining.27

I also would not reach the issue of whether granting vocational retraining benefits to Mr. Tarango violates some unknown, documented worker's equal protection rights because that hypothetical worker is not a represented party before this court in this matter.28

**********FOOTNOTES**********

1 NRS 616C.530.

2 U.S. Const. art. VI, cl. 2.

3 See, e.g., Chicago & N. W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981); De Canas v. Bica, 424 U.S. 351 (1976); Florida Lime & Avocado Growers v. Paul, 373 U.S. 132 (1963).

4 450 U.S. at 317 (quoting Florida Lime Growers, 373 U.S. at 142).
5 424 U.S. 351 (1976).
6 Id. at 354-56.
7 Id. at 356-63.
8 Id. at 363 (quoting Florida Lime Growers, 373 U.S. at 141; Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
9 Id. at 354-56.
10 NRS 616A.105.
11 De Canas, 424 U.S. at 355.
12 Id.
13 See Dowling v. Slotnik, 712 A.2d 396 (Conn. 1998) (holding that IRCA does not diminish state's authority to award workers' compensation benefits to undocumented alien workers).
14 Michelle Mcaloon, Comment, Working But Not "Available to Work": Reconciling the Rights of Undocumented Laborers With the Immigration Reform and Control Act of 1986, 15 Chicano-Latino L. Rev. 92, 109 (1994); John W. Sagaser, Casenote, Rights Without a Remedy--Illegal Aliens Under the National Labor Relations Act: Sure-Tan, Inc. and Surak Leather Company v. NLRB, 27 B.C. L. Rev. 407, 445 (1986).
15 McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 481 (1991); see also Elizabeth M. Dunne, Comment, The Embarrassing Secret of Immigration Policy: Understanding Why Congress Should Enact an Enforcement Statute for Undocumented Workers, 49 Emory L.J. 623, 626 (2000) (citing Pub. L. No. 99-603, 100 Stat. 3359; Philip Shenon, "Startling" Surge is Reported in Illegal Aliens from Mexico, N.Y. Times, Feb. 21, 1986, at A1).
16 H.R. Rep. No. 99-682(I), at 46 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5650.
17 8 U.S.C. § 1324a (1986).
18 Nat'l Labor Relations Bd. v. A.P.R.A. Fuel Oil Buyers Group, Inc., 134 F.3d 50, 56 (2d Cir. 1997).
19 Id.
20 Goldstine v. Jensen Pre-Cast, 102 Nev. 630, 631, 729 P.2d 1355, 1356 (1986).

21 Id.

22 See Peterson v. Neme, 281 S.E.2d 869, 870-71 (Va. 1981) (recognizing that in a majority of jurisdictions, unlawful aliens have standing to sue).

23 See Dowling, 712 A.2d 396 (holding that IRCA does not prevent a state from awarding workers' compensation benefits to an undocumented alien, injured in the course of her employment).

24 NRS 616C.530.

25 Id.

26 Additionally, IRCA criminalizes the transport of an alien into the United States through non-designated ports of entry, illegal transport of aliens within the United States, the knowing or reckless harboring of undocumented aliens, and the knowing or reckless encouragement of undocumented aliens to enter or reside in the United States. 8 U.S.C. § 1324(a) (1994). Placing undocumented workers in a rehabilitation program does not, in and of itself, implicate any of these prohibitions. The worker may still be deported at any time -- the program does nothing to prevent the Immigration and Naturalization Service from acquitting its responsibilities.

27 The majority suggests that Mr. Tarango is not incapacitated or permanently disabled. Although he was cleared for light duty work at the administrative level, the record is unclear as to whether he is able to pursue any of the employment options under NRS 616C.530. This is underscored by the fact that the employer in this case has no position available that would accommodate Mr. Tarango's physical infirmities. This, of course, eliminates the first two employment options under NRS 616C.530. Thus, I would remand this matter as suggested.

28 See, e.g., Hoffman Plastic Compounds, Inc. v. Nat'l Labor Relations Bd., 237 F.3d 639, 650 (D.C. Cir. 2001) (holding that the respondents do not have standing to assert the equal protection rights of third parties).

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
AUG 16 2002
OFFICE OF THE CLERK

No. 01-1876

IN THE

Supreme Court of the United States

ROSALIO FRANCO,

Petitioner,

v.

EMPLOYERS INSURANCE COMPANY OF NEVADA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEVADA SUPREME COURT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner Rosalio Franco, a Mexican national, applied for vocational rehabilitation services under Nevada workers' compensation law. Such benefits were denied by Respondent EICN[1] because Mr. Franco was unable to produce valid documentation of his employment eligibility — a prerequisite to receipt of those services under Nevada law. During the course of the administrative proceedings brought by Mr. Franco to challenge the denial, it was admitted that the Social Security Card he had submitted to his vocational counselor with his Immigration and Naturalization Form I-9 was "not genuine."

1. Should Nevada workers' compensation insurers be forced to give superior vocational rehabilitation benefits to unauthorized alien workers than similarly situated (but legal) workers would be entitled to receive under state law?

2. Is a Nevada court prevented from interpreting provisions of state workers' compensation law to be in harmony with federal immigration law, because this would violate rules governing preemption?

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1. See discussion of Employers Insurance Company of Nevada, a Mutual Company, in Parties to the Proceeding, section, below.

CLARIFICATION OF PARTIES TO THE PROCEEDING AND STATEMENTS UNDER RULE 29.4(c) AND 29.6

J.M. Painting and Drywall, identified as a respondent in the caption, was the employer of Mr. Franco at the time he was injured. That company is not directly participating in these proceedings.

Rule 29.6 Corporate Disclosure Statement

Respondent Employers Insurance Company of Nevada ("EICN") is a private mutual insurance company. It has no parent corporation and no publically held company owns 10% or more of its stock.

At the time of the events at issue, EICN was an agency of the State of Nevada known as the State Industrial Insurance System (referred to in the record as "SIIS" or the "System"), which administered the state's workers' compensation fund. On January 1, 2000, by legislative authorization and proclamation of the Governor of Nevada, the state agency became a private mutual insurance company. Both entities will be referred to as EICN in this brief, unless otherwise specifically stated.[2]

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2. Since EICN is now a private insurer and there is no state run workers' compensation fund, any constitutional finding of this Court based on "state action" by EICN would have no precedential application to future Nevada cases. *See generally*, *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 48-59, 119 S. Ct. 977, 984-990, 143 L. Ed. 2d 130, 142-150 (1999).

Rule 29.4(c) Statement

The Petition attempts to call into question the constitutionality of certain Nevada statutes as interpreted by the Nevada Supreme Court. Due to EICN's privatization, neither the State nor any agency, officer or employee of the State is currently a party. The Petition fails to recite that 28 U.S.C. § 2403(b) may apply and was not served on the Attorney General of Nevada, as required by Rule 29.4(c). EICN has therefore served this Opposition and a 'courtesy copy' of the Petition on the State Attorney General.

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INDEX TO EICN'S LODGING

EICN has lodged documents to provide background for its Brief. The Lodging is made up of three categories.

Opinions Below

The decisions of the administrative courts below are not reproduced in the Petitioner's Appendix. Factual findings of the administrative Appeals Officers are given great weight by reviewing courts under Nevada law. NRS 233B.135(3). EICN therefore has included copies of the following in its Lodging:

October 21, 1997 — Decision and Order of Hearing Officer, Department of Administration Appeals Division. ..... [Ldg., p. L8.]

February 25, 1998 — Decision and Order of Appeals Officer, Department of Administration Appeals Division. ..... [Ldg., pp. L9-L13.]

Nevada Statutes and Regulations

The following provisions of the Nevada Revised Statutes ("NRS") and the Nevada Administrative Code ("NAC"), that are important to this case but are not reproduced in the Petitioner's Appendix are set out in EICN's Lodging:

NRS 616C.595 ..... [Ldg., p. L14.]

NAC 616A.270 ..... [Ldg., pp. pp. L18-L19.]

NAC 616C.550 ..... [Ldg., pp. L15.]

NAC 616C.565 ..... [Ldg., p. L16.]

NAC 616C.610 ..... [Ldg., p. L17.]

Other Material from the Record Below

EICN has included copies of other documents from the record below which evidence material misstatements of fact in the Petition and clarify other matters that are believed to be important to the Court's consideration of the Petition. Those documents include:

July 21, 1997 — Immigration and Naturalization Form I-9. ..... [Ldg., p. L1.]

Social Security Card. ..... [Ldg., p. L2.]

July 22, 1997–Report (vocational assessment). ..... [Ldg., pp. L3-L4.]

August 12, 1997– Letter (offer of rehabilitation lump sum buyout). ..... [Ldg., pp. L5-L6.]

September 2, 1997– Letter (termination of rehabilitation) ..... [Ldg., p. L7.]

I. CLARIFICATION OF RECORD AND STATEMENT OF THE CASE

The facts described in the Petition bear little similarity to those in the record. The following is an accurate summary of the material facts.

In 1995, Petitioner Rosalio Franco, sustained an on the job injury in Nevada. He filed a workers' compensation claim which was accepted by EICN. During the course of the claim, he received medical and disability compensation benefits. [Petition, p. 5.]

It is undisputed Mr. Franco was an undocumented Mexican national working in Nevada in violation of federal law. [*See, e.g.*, Petition, pp. 2, 5.]

Vocational rehabilitation services in Nevada require the insurer to adhere to a priority scheme for levels of benefits "designed to return the injured worker to the workforce by helping him obtain employment within his physical abilities." *Tarango v. SIIS*, 117 Nev. Adv. Op. 40, 25 P.3d 175, 178 (2001) [Petitioner's Appendix ("Pet. App."), pp. xv-xxxix, iviii.] The first four levels of benefits require direct placement in a job. NRS 616C.530. [Pet. App., p., xiv.] The fifth and most expensive level involves formal training or education, without mandatory placement. *Id.*[3]

A "buyout" or lump sum of money may be offered to a worker as a substitute for any of the levels, and is

3. Even at the formal training level the counselor "shall consider including" a period for job search after the conclusion of the program. NAC 616C.565. [Lodging "Ldg.," p. 16.]

discretionary on the part of all parties. NRS 616C.595. [Ldg., p. L14.] A buyout is considered a "vocational rehabilitation service," the object of which is to get the worker back into the workforce. *See, e.g.*, NRS 616C.595; NAC 616C.505(3)(i).

Mr. Franco sought vocational rehabilitation services, and requested a lump sum buyout. [Ldg., p. L10.] A buyout may only be offered when certain requirements have been met. Among other things, a vocational assessment must be done by a rehabilitation counselor before this substitute benefit can be offered by the insurer. NRS 616C.595.[4]

On July 21, 1997, Mr. Franco met with his rehabilitation counselor for the vocational assessment. [Ldg., p. L4.] Mr. Franco signed an Immigration and Naturalization Form I-9, and provided a Social Security Card and a Nevada Driver's License as proof of work authorization. [Ldg., pp. L1, L2.] ***It was later admitted during the course of the administrative proceedings that his Social Security card was "not genuine."*** [Ldg., pp. L10-L11.]

The next day (July 22, 1997), the counselor sent her report to EICN recommending a rehabilitation buyout be offered to Mr. Franco.[5] There is no indication the counselor

4. The relevant portion of NRS 616C.595 (i.e., 616C.595(3)(a)) is omitted from the reproduction of that statute in the Petitioner's Appendix. [Pet. App., pp. xiii-xiv.] EICN has therefore included a full copy of the statute in its Lodging. [Ldg, p. L14.]

5. Mr. Franco was found eligible for a level of rehabilitation requiring placement in a job. The Transferable Skills Analysis found Mr Franco ". . . . to have some residual skills which he could employ in other jobs based on his past experience and within his physical limitations." [Ldg., p. L3.] Also see, Nevada Supreme Court findings (Cont'd)

had yet discovered the documents were false. ***Statements in the Petition that the buyout was offered before work authorization documents were required are not correct.*** [See, e.g., Petition, pp. 7, 14-16.] It was not until August 12, 1997, that EICN sent a letter offering a lump sum settlement to Mr. Franco. [Ldg., pp. L5-L6.]

On September 2, 1997, EICN sent a letter to Mr. Franco terminating vocational rehabilitation, explaining:

> One of the legal requirements for any individual who wishes to participate in vocational rehabilitation services is that the injured worker must complete an Immigration and Naturalization Form I-9 and provide the proper documentation of employment eligibility. ***Recently, we were notified that you could not provide all of the required documentation when requested to do so.*** Therefore, before we can process your rehabilitation lump sum we are giving you until September 16, 1997 to provide the necessary documents. If you are not able to do so, we will have no alternative but to close your vocational rehabilitation. (Emphasis added.)

[Ldg., p. L7.]

Mr. Franco appealed the September 2, 1997 letter. The administrative Hearing Officer and the Appeals Officer both found that Mr. Franco was not eligible for workers'

(Cont'd)
below. [Pet. App., p. vi.] ***Mr. Franco's claim [Petition, p. 6] there was no discussion of returning him to the workforce in the United States is false.*** [*See, e.g.*, Ldg., p. L3-L4.]

compensation vocational rehabilitation, because he could not provide documentation of eligibility to work. [Ldg., pp. L8, L9-L13.] As stated above, during the course of these proceedings Mr. Franco's Social Security Card was admitted to be false. [Ldg., pp. L10-L11.] These rulings were reviewed and upheld by the State District Court and the Nevada Supreme Court. [Pet. App., pp. iv-viii.]

The Nevada Supreme Court found this case to be "virtually indistinguishable factually" from *Tarango v. SIIS.* [Pet. App., p. vii.] The court found "[a]ccording to the record on appeal, except for his immigration status, Franco is employable in a light to medium duty job with some lifting restrictions. Franco is not, therefore, entitled to vocational rehabilitation, and SIIS properly closed his claim without providing such benefits." [Pet. App., p. vii.] ***Mr. Franco's assertion he was eligible for formal retraining without job placement (the highest level of benefits) is against the specific factual findings of the Nevada Supreme Court.*** [Petition, p. 5.] Mr. Franco brought a Petition for Rehearing disputing those factual findings, but it was denied by the Nevada Supreme Court. [Pet. App., p. ix.]

II. REASONS FOR DENYING THE WRIT

A. Mr. Franco's Questions

Mr. Franco's Question 1 on equal protection mischaracterizes the findings of the Nevada Supreme Court. [Petition, p. I.] Neither this case nor *Tarango v. SIIS* prevented *all* undocumented aliens from receiving benefits. The ruling below denied specific benefits to Mr. Franco, based upon his individual factual situation. The ruling was tailored to allow the law to meet the legitimate public purpose of efficiently returning injured employees into the workforce.

Mr. Franco's Question 2: This case is not a worthwhile vehicle for this Court to consider preemption. [Petition, p. I.] The Nevada Supreme Court found Mr. Franco is physically employable and therefore would only be eligible for lower levels of rehabilitation benefits. [Pet. App., pp. vi-ix, xv-xxxix.] The Nevada court "harmonized" the IRCA with state workers' compensation law, and found equal protection prevented giving Mr. Franco a higher level of benefits than a similarly situated legal worker, merely because he is in the country illegally. Any IRCA "preemption" was incidental to the overall findings.

B. No Compelling Reason to Review

Mr. Franco has not presented any compelling reasons for discretionary review of the state court findings, as required by Supreme Court Rule 10.[6]

Federal courts to defer state court interpretations of state statutes. *See, e.g., Arizonans for Official English v. Arizona*, 520 U.S. 43, 48, 117 S. Ct. 1055, 1059, 137 L. Ed. 2d 178, 181 (1997). Factual findings receive similar deference. *Hernandez v. New York*, 500 U.S. 352, 364-369, 111 S. Ct. 1859, 1868-1870, 114 L. Ed. 2d 395, 409-412 (1991). All arguments in support of the Petition would require this Court to review and overturn the state court's factual findings and interpretations of state workers' compensation law.

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6. The cases cited by Mr. Franco do not deal with the specific scenario presented here. [Petition, pp. 13-16.] A much more similar case is *Del Taco v. Worker's Compensation Appeals Bd.*, 79 Cal.App.4th 1437, 94 Cal.Rptr.2d 82 (Cal. App., 2000) (cited by the Nevada Supreme Court in *Tarango)*. Additionally, *see Rivera v. United Masonry*, 292 U.S. App. D.C. 182, 948 F.2d 774 (D.C. Cir. 1991).

Public policy as recently expressed by this Court in *Hoffman Plastic Compounds, Inc. v. N.L.R.B.* __ U.S.__, 122 S. Ct. 1275, 1282-1284, 152 L. Ed. 2d 271, 279-80 (March 27, 2002), prevents a grant of benefits that would effectively reward criminal violations of the immigration laws.

C. Constitutional Claims

EICN's refusal to award vocational rehabilitation to Mr. Franco was not unconstitutional, under the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.

Mr. Franco's equal protection rights have been well protected by Nevada workers' compensation law. Rather than depriving individuals from workers' compensation on the basis of alienage, Nevada law specifically includes "aliens," "whether lawfully or unlawfully employed," in the definition of "employee."[7] NRS 616A.105 [Pet. App., p. xii.] The challenged classification should be analyzed under the "rational basis test," because it does not involve a "suspect class" or impinge upon "fundamental rights." *Plyler v. Doe*, 457 U.S. 202, 219-221, 102 S. Ct. 2382, 2396-2397, 72 L. Ed. 2d 786, 800-802 (1982). *See generally*, *Heller v. Doe*, 509 U.S. 312, 319, 113 S. Ct. 2637, 2643, 125 L. Ed. 2d 257, 270-271 (1993).

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7. Nevada law is therefore consistent with *Plyler v. Doe*, *supra*, 457 U.S. 202 , 210-221, 102 S. Ct. 2382, 2391-2397, 72 L. Ed. 2d 786, 795-802 (1982) — and other cases cited in the Petition acknowledging illegal aliens are entitled to equal protection under the Constitution. [Petition, pp. 4, 8-11.]

Mr. Franco received medical benefits and disability compensation. [Petition, p., 5.] Vocational rehabilitation benefits, however, are defined as "the process of assisting an injured employee . . . to return to gainful employment." NAC616A.270. [Ldg., p. L18.] The Nevada laws which establish a mandatory priority scheme for vocational rehabilitation benefits, the lowest four levels of which require actual placement in a job, are rationally related to the legitimate government interest of efficiently returning injured employees into the workforce.[8]

The law meets the "rational basis test," and is constitutional under the Equal Protection Clause of the Fourteenth Amendment.

The allegation of "invidious discrimination" against a class based upon race or alienage greatly exaggerates the state court holding and its effect. Mr. Franco's argument that the laws primarily affect Hispanics, in an attempt to raise the analysis to strict scrutiny due to race, ***is outside the record and wrong***. [Petition, pp. 11-12.] Aliens from many countries come into the United States illegally to work.[9]

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8. *Tarango v. SIIS*, *supra*, 117 Nev. Adv. Op. 40 (citing *Plyler v. Doe*, *supra*, 457 U.S. 202, 102 S. Ct. 2382, 72 L. Ed. 2d 786). [Pet. App., p. xxxvii.] The most expensive level of vocational rehabilitation is formal retraining. NRS 616C.530(5). [Pet. App., p. xiv.] Since the state court found Mr. Franco was not physically entitled to such benefits, the ruling does not specifically preclude all undocumented aliens from receiving vocational services. The law is tailored to meet permissible state interests and would withstand even the "intermediate-scrutiny analysis" proposed by Mr. Franco [Petition, pp. 8-9].

9. *See generally*, cases involving immigration problems of other nationalities such as; *Jean v. Nelson*, 472 U.S. 846, 105 S. Ct. 2992,

(Cont'd)

No specific Due Process challenge has been argued in the Petition or below. In any event, Mr. Franco's Fourteenth Amendment Due Process rights were not violated. He had no protected property interest in the vocational rehabilitation benefits because he had not met the prerequisites for entitlement under state law. *See American Mfgs. Mut. Ins. Co. v. Sullivan*, *supra*, 526 U.S. 59-61, 119 S. Ct. 989-990, 143 L. Ed. 2d 149-151.

D. Preemption By Federal Immigration Law

Mr. Franco contends federal immigration law cannot preempt specific aspects of Nevada workers compensation vocational rehabilitation law. He argues the circumstances do not meet the tests for Supremacy Clause preemption in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516-517, 112 S. Ct. 2608, 2617-2618, 120 L. Ed. 2d 407, 422-423 (1992). He also claims the McCarran-Ferguson Act, which allows the states to regulate the business of insurance, does not allow the IRCA to preempt state workers' compensation law.

The Nevada Supreme Court found that Nevada law, when harmonized with the federal immigration statutes and considerations of equal protection, required that Mr. Franco not be given vocational rehabilitation benefits. Nevada law would have authorized termination of the benefits without a finding of preemption by the IRCA.[10] The case is therefore

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86 L. Ed. 2d 664 (1985) (Hatians); *Carlson v. Reed*, 249 F.3d 876 (2001) (Canadian); *U.S. v. Oloyede*, 982 F.2d 133 (4th Cir. 1992) (Nigerians and Ethiopians).

10. The Nevada statutes and regulations require a vocational assessment prior to offering vocational rehabilitation benefits, which led to the discovery that Mr. Franco could not be placed in another (Cont'd)

not a good vehicle for this Court to evaluate preemption of workers' compensation law under either the *Cipollone* tests or the McCarren-Ferguson Act.

This Court has recently given a comprehensive analysis of the import of the IRCA, in holding the IRCA prevents awards of NLRB backpay to undocumented aliens. *Hoffman Plastic Compounds, Inc. v. N.L.R.B., supra*, __ U.S.__, 122 S. Ct. 1275, 152 L. Ed. 2d 271. The question of whether federal immigration law should prevent illegal workers from receiving awards of rehabilitation benefits cannot be distinguished — particularly where the worker admits to having tendered fraudulent documents. *Id.*, at __, 122 S. Ct. at 1283, 152 L. Ed. 2d at 279; 8 U.S.C. § 1324c(a).[11] Any provision of Nevada law to the contrary should be overridden by the federal immigration policies as expressed in the IRCA. The "IRCA 'forcefully' made combating the employment of illegal aliens central to '[t]he policy of immigration law.'" *Hoffman Plastic Compounds, Inc. v. N.L.R.B., supra*, __U.S. __, 122 S. Ct. at 1282, 152 L. Ed. 2d at 279 (quoting from *INS v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 194, and n.8, 112 S. Ct. 551, 116 L. Ed. 2d 546 (1991)).

(Cont'd)
job because he was not authorized to work in the United States. *See, e.g.*, NRS 616C.595(3)(a). Nevada law also allows termination of those benefits where there has been a material "concealment." NAC 616C.601(3).

11. In fact, *there is even more reason to prevent the benefits sought by Mr. Franco than there was in Hoffman.* Unlike the *Hoffman* employer who was guilty of a serious unfair labor practice, *no one is claiming Mr. Franco's employer did anything wrong. Cf. Hoffman Plastic Compounds, Inc. v. N.L.R.B., supra*, __ U.S.__, 122 S. Ct. 1285-1290; 152 L. Ed. 2d 285-290 (dissenting opinion).

The strong analysis by this Court in *Hoffman* shows the IRCA thoroughly dominates the legislative field involving the employment of undocumented aliens, and conflicts with any state law geared toward returning such individuals to the work force. *Cipollone* would require IRCA pre-emption under at least two of its three tests. *Cipollone v. Liggett Group, Inc., supra*, 515 U.S. 504, 516-517, 112 S. Ct. 2608, 2617- 2618, 120 L. Ed. 2d 407, 422-423.

The McCarran-Ferguson Act[12] only prevents preemption by a federal law that "invalidate(s), impair(s) or supercede(s)" the state insurance law. 15 U.S.C. § 1012(b). In *Humana Inc. v. Forsyth*, 525 U.S. 299, 303, 119 S. Ct. 710, 714, 142 L. Ed. 2d 753, 758-759 (1999), the Court explained that where the federal law advances the State's interests relating to the insurance issue, and does not frustrate any articulated state policy or disturb the state's administrative regime, the McCarran-Ferguson Act rule against preemption does not apply. This is precisely the situation involved in this case. Nevada law and the rulings below acknowledge *the propriety* of preventing Mr. Franco from taking advantage of workers' compensation vocational rehabilitation services before he was authorized to work.

The arguments in the Petition that preemption is inappropriate do not justify Certiorari review by this Court.

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12. 15 U.S.C. § 1011-1015; The Act only relates to a law that regulates the business of insurance and may not apply for that reason, as well.

III. CONCLUSION

It is respectfully submitted the Petition should be denied.

Respectfully submitted,

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